IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No.....

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TRACY, CHAPMAN & WELLES,
Toledo, Ohio,

MILBANK, TWEED, HOPE & WEBB,
New York, N. Y.,
Solicitors for Petitioner.

THE WILKINSON-SLOAT PRINTING CO., BRIEF AND RECORD PRINTERS
1215-17 JACKSON ST., TOLEDO, O. PHONE MAIN 6757

TOPICAL INDEX

		Page
A.	Opinion Below	1
B.	Jurisdiction	2
C.	Statement of the Case	2
D.	Argument Upon Questions Presented	4
	I. The Circuit Court of Appeals for the Sixth Circuit Erred in Holding (1) That the Injunction Violates Judicial Code, Section 265, and (2) That Petitioner Had Failed to Show One of the Essential Conditions to Justify the Courts Below in Restraining the Respondent City from Destroying Petitioner's Property Rights by Seeking Enforcement of the Quo Warranto Decree in the State Court; and the Decision Conflicts with the Decisions of the United States Supreme Court, Other Circuit Courts of Appeals and the Prior Decisions of the Circuit Court of Appeals for the Sixth Circuit	4
	1. After Final Judgment in State Court Judicial Code Section 265, Does not Inhibit Injunction Against Unconscionable Use Thereof	5
	2. There was ample showing by petitioner of conditions essential to justify the courts below in restraining the respondent city from enforcing the quo warranto decree	6
	(1) Conflict of the decision below with United States Supreme Court Decisions	7
	(2) Conflict of the decision below with decisions from other circuits	12
	(3) Conflict of the decision below with a prior decision of the Circuit Court of Appeals for the Sixth Circuit	15

(4) Petitioner could not have asserted its rights as Mortgagee in the quo warranto suit 16

II. The Federal Courts, not Being Inhibited by Judicial Code, Section 265 From Granting the Injunction Under the Facts of This Case, Petitioner is Entitled to Protection by Injunction Against Destruction of its Property in the Franchises Whether Such Destruction is Threatened by Force or Unconscionable Enforcement of the Ouster Decree 18

III. The Petitioner Mortgagee Not Having Been a Party to or Served in the Quo Warranto Proceedings, is Not Bound by the Quo Warranto Decision; But is Entitled to its Day in Court in a Forum of its Own Selection and Upon Issues Deemed Pertinent by it Upon the Questions of the Existence of the Franchises and its Rights Therein; the Circuit Court of Appeals Erred in Giving Conclusive Effect to the Quo Warranto Decision by Refusing to Pass Upon Said Questions 20

1. Petitioner is entitled to an independent determination by the federal courts upon the questions of the existence of the franchises and its rights therein 20

2. The decision of the Circuit Court of Appeals in holding that petitioner's bill must be dismissed without considering the issues as to the nature, source and extent of the franchise rights results in leaving the respondent city at liberty to destroy petitioner's rights in the franchise either by force or by application to the state courts to enforce the decree against the Ohio Electric Power Company, and thus deprive petitioner of vested property rights without ever having had a day in court 24

3. Under the statutes of Ohio, as construed by the Supreme Court of Ohio at the time the Power Company mortgage upon the Norwalk franchise was executed, such franchise was valid and was derived from the State 25

4. The Circuit Court of Appeals erred in ordering the bill dismissed without affording petitioner an opportunity to show that it had no knowledge of the quo warranto proceedings until after final judgment therein 28

E. Conclusion 30

APPENDIX—STATUTES INVOLVED

(a) Scope of the injunction 31

(b) Nature of quo warranto 31

(c) Nature and extent of franchise rights 35

INDEX OF AUTHORITIES

A.

American Surety Company v. Baldwin, (Nov. 14, 1932) 287 U. S. 156, 164 10

Atchison Railway Co. v. Wells (1924) 265 U. S. 101 ..... 8, 11

B.

Ballard & Ballard Company v. Munson Steamship Line (C. C. A. 6-1928) 25 Fed. (2d) 252 15

C.

Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167 29

Coe v. Armour Fertilizer Works (Fla. 1915) 237 U. S. 413 ..... 11, 17

Columbus Gas & Fuel Co. v. Columbus (C. C. A. 6) 55 F. (2d) 56 29

E.

Essanay Film Co. v. Kane (1922) 258 U. S. 358 5

F.

Farmer v. Columbiana Telephone Co. (1905) 72 O. S. 526, 63 Fed. (2d) 911 25

Firestone Tire & Rubber Co. v. Marlboro Cotton Mills (C. C. A. 4 1922) 282 Fed. 811 certiorari denied 260 U. S. 749 13

G.

Gelpcke v. City of Dubuque (1863) 1 Wallace 175, 68 U. S. 175 ..... 27, 28

General Code of Ohio, Section 12303-12344 16

General Code of Ohio, Section 12310 18

Great Northern R. R. v. Sunburst Oil & Refining Co. (1932) 77 Law Ed. 153 28

H.

Hardin-Wyandot Lighting Company v. Upper Sandusky (1916) 93 O. S. 428, 251 U. S. 173 25

J.

Judicial Code, Section 265 ..... 4, 5, 8, 18, 19

K.

Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360 23

L.

Lee v. State Bank & Trust Co. (C. C. A. 2) 38 F. (2d) 45 29

Lewis & Lewis v. Symmes, 61 O. S. 471 28

Louisville Trust Co. v. Cincinnati, 76 Fed. 296 (C. C. A. 6-1896) 22, 23

M.

Moore-Mansfield Co. v. Electrical Co. (1914) 234 U. S. 619, 625 28

O.

Ohio Electric Power Company v. State of Ohio, ex rel Martin 121 O. S. 235 4

Ohio Public Service Co. v. State ex rel Fritz (June 2, 1925) 113 O. S. 325, reversed (April 11, 1927) 274 U. S. 12 26

Old Colony Trust Co. v. Omaha (1913) 230 U. S. 100.... 8

P.

Panama Mail S. S. Co. v. Vargas, 281 U. S. 670..... 29

Postal Telegraph Cable Co. v. Newport, (1918) 247 U. S. 464, 476 21

Q.

Queen City Telephone Co. v. Cincinnati (1905) 73 O. S. 64 25

S.

Simon v. Southern Railway (1915) 236 U. S. 115.....5, 8, 19

State of Ohio, ex rel Martin v. Ohio Electric Power Company, 35 Ohio App. Rep., 481 4

State ex rel v. Columbus Del. & M. Elec. Co. (1922) 104 O. S. 120 16

State ex rel v. Northern Ohio Traction & Light Co. (1915) 93 O. S. 466, reversed (1918) 245 U. S. 574.. 26

43 Statutes, 938 (Judicial Code Section 240) U. S. C. A., Title 28, Section 347 1

T.

Thomas v. State of Ohio, ex rel Gilbert, 76 O. S., 341.... 28

Tidal Oil Company v. Flanagan (1924) 263 U. S. 444, 452 28

Toledo Traction Light & Power Co. v. Smith (1913 District Court, N. D. of Ohio) 205 Fed. 643, 662.... 16

U.

United Sheet & Tin Plate Co. v. Hess (C. C. A. 6-1908) 159 Fed. 889 22

U. S. v. Rio Grande Dam & Irrigation Co., 184 U. S. 416 29

W.

Wells Fargo & Co. v. Taylor (1920) 254 U. S. 175.....17, 19

Western Union Telegraph Co. v. Tompa (C. C. A. 2-1931) 51 Fed. (2d) 1032 12

Wilson v. Spencer (C. C. A. 5) 261 F. 357..... 29

Z.

Zanesville v. Zanesville Telephone & Telegraph Co. (1901) 64 O. S. 67 25

IN THE

Supreme Court of the United States

OCTOBER TERM 1932

No.....

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A

OPINIONS BELOW

The opinion of the District Court of the Northern District of Ohio, Western Division (filed February 7, 1931) is found at pages 211, et seq. of the record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit (filed March 17, 1933), is found at pages 572, et seq. of the record and reported at 63 Fed. (2d), 911.

B

JURISDICTION

Petition for Rehearing was filed on April 15, 1933, within the time provided by the rules of the Circuit Court of Appeals (R. 577) and the Petition for Rehearing was denied May 18, 1933 (R. 639).

The jurisdiction of this court is based upon 43 Statutes, 938 (Judicial Code Section 240), as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347.

C

STATEMENT OF THE CASE

The petitioner, as trustee, by virtue of various mergers, is the successor mortgagee of all the properties, franchises and rights of the Ohio Electric Power Company (an Ohio corporation) in the City of Norwalk, Ohio, (respondent) (R. 277, 278) which were conveyed to the original mortgagee by supplemental mortgage dated May 25, 1925, (filed for record at Norwalk with the Recorder of Huron County, Ohio, June 19, 1925) (R. 412) prior to the acts and assertions of claims of the City of Norwalk, on account of which petitioner's predecessor, The Equitable Trust Company of New York, filed this action in the District Court on January 3, 1930.

About $130,000 of bonds, of a total of $2,600,000 under the mortgage and supplemental mortgage were issued and sold in 1925 upon the basis of the Norwalk properties, including the Norwalk franchise (R. 184-191).

Petitioner contends that then and now under the law of Ohio, as previously declared by the Ohio state courts and the United States Supreme Court, Ohio Electric Power Company was and is the owner and holder of perpetual franchises to use the streets of Norwalk, which two of its predecessor Ohio corporations in title, namely, The Incandescent Light and Power Company, organized in 1891, and Northern Electric Company, organized in 1895, had acquired directly from the State of Ohio by incorporation under the statutes of Ohio in effect between 1887 and 1896.

Quo warranto action against the Ohio Electric Power Company in the Court of Appeals of Huron County, Ohio, was started on May 19, 1926, following two resolutions by the City Council of Norwalk, the first on March 23, 1926, (R. 445) directing the Ohio Electric Power Company to remove its equipment from the streets within thirty days, and the second on May 18, 1926, (R. 449) requesting that the Prosecuting Attorney of Huron County, Ohio, take legal steps under the laws of Ohio in quo warranto to oust the Ohio Electric Power Company. This resolution engaged the Prosecuting Attorney and the City Solicitor as counsel for the City to do all things necessary to accomplish said ouster (R. 449), so that the action was instituted and carried on at the instance and expense of the respondent, City of Norwalk, Ohio. Only the Ohio Electric Power Company was made party defendant to that action. *Neither the petitioner's predecessors ,the petitioner, nor any of the bondholders under the mortgage were made parties to the quo warranto action or served with process or notice of any*

kind or represented in that suit, all of which appears from petitioner's bill of complaint and is admitted by the city's answer. (R. 13, 43). The State Court of Appeals rendered a decree on June 7, 1928, *State of Ohio ex rel Martin v. Ohio Electric Power Company,* 35 Ohio App. Rep. 481, ousting the Ohio Electric Power Company from the streets and public places of the City of Norwalk, Ohio. The Supreme Court of Ohio affirmed that judgment on June 12, 1929, *Ohio Electric Power Company v. State of Ohio, ex rel Martin,* 121 O. S. 235.

The enforcement of the quo warranto decree will destroy entirely the value of the properties of the Ohio Electric Power Company located in the City of Norwalk, Ohio, and consequently wipe out all that substantial portion of petitioner's security under the mortgage. (R. 119)

D

ARGUMENT UPON QUESTIONS PRESENTED

I.

The Circuit Court of Appeals For the Sixth Circuit Erred in Holding (1) That the Injunction Violates Judicial Code, Section 265, and (2) That Petitioner Had Failed to Show One of the Essential Conditions to Justify the Courts Below in Restraining the Respondent City From Destroying Petitioner's Property Rights by Seeking Enforcement of the Quo Warranto Decree in the State Court; AND THE DECISION CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT, OTHER CIRCUIT COURTS OF APPEALS AND THE PRIOR DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

1. After Final Judgment in State Court Judicial Code Section 265, Does Not Inhibit Injunction Against Unconscionable Use Thereof.

This court, as we understand the decisions, has clearly held that Judicial Code Section 265 has no application after the termination of the proceedings in the State Court, when the Federal Court plaintiff seeks only to prevent enforcement or unconscionable use by a party of the judgment obtained in the State Court.

Simon v. Southern Railway, (1915) 236 U. S. 115:

> "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment— a new state of facts, not within the language of the statute may arise." (p. 124)

Essanay Film Co. v. Kane, (1922) 258 U. S. 358:

> "But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud *or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of* 1793 *to avoid.*" (p. 360). (Italics ours).

We also respectfully submit that the Circuit Court of Appeals has placed a misconstruction upon the injunction decree of the District Court in interpreting the language

thereof as operating directly upon the State Courts of Ohio. The only proper interpretation upon the face of the language is that the decree is directed to the City of Norwalk and those who may act for the City to prevent the City and its representatives from taking steps or filing applications to move the State Court to enforce the quo warranto decree. The injunction does not run against the State courts or their officers. If the language of the injunction could be construed in any phase as operating directly upon the State courts, it is submitted that the Circuit Court of Appeals should have modified the language so as to remove any doubt as to the scope thereof, or should have remanded the case to the District Court with instructions to do so instead of ordering the dismissal of petitioner's bill.

2. There Was Ample Showing by Petitioner of Conditions Essential to Justify the Courts below in Restraining the Respondent City From Enforcing the Quo Warranto Decree.

The Circuit Court of Appeals announced the proposition that in order to justify federal courts in restraining the respondent city from enforcing the quo warranto decree *one* of the following conditions must be shown: (a) the necessity of protecting federal court jurisdiction properly acquired and subsisting; or (b) that the state court decree was void; or (c) fraud, mistake or accident in the procuring of the state court judgment; or (d) denial of notice and opportunity to be heard in the state court action,

i..e., that petitioner had no knowledge of the state court proceedings until after final judgment therein, or could not have appeared in those proceedings to assert its rights and defenses, in connection with which the federal court plaintiff must appear free from fault or negligence.

It is respectfully submitted that the court below erred in so holding, but nevertheless, that not only one but two of the conditions announced by the court below as prerequisite to the injunction are satisfied, because (1) the state court judgment is of no effect and void as to petitioner, and (2) denial of notice and opportunity to be heard fully appears from the admitted fact that neither petitioner nor any of the bondholders was made a party to the state court action or served with any process therein. It was not incumbent upon petitioner, we submit, to show affirmatively that it had no knowledge of the state court action until after final judgment therein, or could not have appeared therein to assert its rights. Moreover, it appears as a matter of law from the nature of quo warranto under the Ohio statutes that petitioner would have had no standing to assert its rights in the quo warranto suit, even though petitioner had known of that action before final judgment therein.

(1) Conflict of the Decision Below With United States Supreme Court Decisions.

The proposition that the enforcement of a void state court judgment even against one actually named a party to the state court case will be restrained by the federal courts

regardless of Section 265 of the Judicial Code, as we understand it, is undisputed. *Simon v. Southern Railway*, supra, and *Atchison Railway Co. v. Wells*, (1924) 265 U. S. 101.

However, under the opinion of the majority of the Circuit Court of Appeals it appears that a distinction must be made in the application of this rule between a case where one is made a party to the state court action and not served, and a case such as that at bar *where one is neither made a party nor served with notice.*

The opinion of the Circuit Court of Appeals requires that relief must be given in the first case even though the state court defendant had actual (but not legal) notice of the state court proceedings, but holds that in the present case the state court judgment against the Power Company is conclusive and binding upon the present petitioner and that it can have no relief, although it and its predecessor Trustee were neither named as a party nor served in the state court case.

We submit that no such distinction exists, and that the judgment in the second type of case is for all purposes as void and inconclusive as to the mortgagee not made a party as the judgment in the first example, and that the inequitable use of such judgment should be restrained without requiring any showing upon the part of the mortgagee that it was unaware of the State Court proceedings until after final judgment or could not have intervened therein to protect its rights.

In *Old Colony Trust Co. v. Omaha*, (1913) 230 U. S. 100, the situation was like the case at bar in every essential

characteristic. There in the prior suit which was brought by the mortgagor, the utility company, against the City in Federal Court, the City had obtained a final judgment dismissing the bill which upheld a city ordinance, the enforcement of which would cut away the rights of the Trustee, which judgment had been affirmed by the Circuit Court of Appeals, and the case was pending upon appeal by the mortgagor company to the United States Supreme Court when the later suit was brought in Federal Court by the Trustee (Mortgagee) against the City for an injunction against the enforcement of the ordinance. Hence the suit in reality was one to enjoin the City from making an unconscionable use of the prior judgment.

The record in that case (which we have obtained and examined minutely) shows not only that the Trustee was not made a party to the prior suit, but there was no proof or showing by the Trustee that it did not at all times know of the pendency of the prior suit or that it could not have intervened therein, and there was no showing of any of the other conditions, one of which the Circuit Court of Appeals for the Sixth Circuit has said is essential as a basis for relief in this case, and, furthermore, in the Old Colony case the contention was made, as in the case at bar, that the second suit was nothing more than an attempt to relitigate the issues which had been presented in the prior suit. This court in that case said at page 122 of the opinion:

> "A prior suit by the Electric Company against the City, largely but not entirely like the present,

resulted in a decree against the Electric Company. The City now takes the position that that decree is conclusive upon the Trust Company as mortgagee. But the law is otherwise. The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. Keokuk & Western Railroad Co. v. Missouri, 152 U. S. 301, 313; Louisville Trust Co. v. Cincinnati, 76 Fed. Rep. 296."

The most recent pronouncement of this court upon the point, we believe, is found in *American Surety Company v. Baldwin,* (Nov. 14, 1932) 287 U. S. 156, at page 164:

"The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare National Exchange Bank v. Wiley, 195 U. S. 257; Cooper v. Newell, 173 U. S. 555. *And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure.* Simon v. Southern Ry. Co., 236 U. S. 115; Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101; Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (Italics ours)

In *Atchison Ry. Co. v. Wells*, 265 U. S. 101, where Wells, a Colorado citizen, had sued the Santa Fe in Texas, and had secured a writ of garnishment to a Texas Railway Company, but was not able to make personal service upon the Santa Fe in Texas, and the Santa Fe received notice by personal service on one of its officers in Kansas of the Texas suit in time to have appeared therein, it was contended that the Federal Court plaintiff should have entered into the State Court action and there asserted its rights. This court held the injunction restraining the enforcement of the judgment as being void, was proper, and said:

> "The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (pp. 103, 104).

Nor would it have been enough to justify the decision of the court below even had the petitioner learned by any chance extra judicial notice, that questions as to the franchise rights were being adjudicated in the then pending quo warranto suit in the state court in which petitioner was not made a party or served with process.

Coe v. Armour Fertilizer Works, (Fla. 1915) 237 U. S. 413:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the

validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court." (pp. 424, 425).

(2) Conflict of the Decision Below With Decisions From Other Circuits.

Western Union Telegraph Co. v. Tompa (C. C. A. 2—1931) 51 Fed. (2d) 1032, was a suit by the Telegraph Company to enjoin Tompa from prosecuting an action in the New York Supreme Court against the New York Central Railroad Company, Tompa having been injured on a railroad car while working for the Telegraph Company on premises of the New York Central Railroad Company, the Telegraph Company having a standing agreement to indemnify the railroad against any claims on account of such injuries, and Tompa having agreed with the Telegraph Company not to sue the Railroad Company on account of any such injuries, but to look to the relief plan of the Telegraph Company or Workmen's Compensation. *The Telegraph Company had notice of the pending suit in the state court.* Though the federal court refused to issue an injunction against the proceedings in the state court, *it did enjoin the plaintiff therein from enforcing any judg-*

ment she might obtain. As against the contention that the Telegraph Company should have asserted its rights in the state court, the Circuit Court of Appeals of the Second Circuit said:

> "The prosecution of the defendant's pending suit is in violation of her agreement with the plaintiff, and the plaintiff has no adequate remedy at law. *Even if we assume that the plaintiff has a remedy in an independent action in equity in the state court or, without deciding, by petition to intervene in the now pending suit, such a remedy does not deprive it of the right to seek redress in this action, curtail the power, or do away with the duty of a federal court to grant relief within the limits, and to the full extent, of its own jurisdiction.* Simon v. Southern Railway Co., supra; Hyde & Oglesby v. Stone, 20 How. 175, 15 L. Ed. 874." (p. 1034) (Italics ours).

Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, (C. C. A. 4, 1922) 282 Fed. 811, certiorari denied 260 U. S. 749, referred to by this court in *Atchison Ry Co. v. Wells,* supra, involved a situation directly analagous to the one now under consideration. The Ohio Firestone Company entered into a contract with a South Carolina Company, which filed suit for a breach of contract against the Ohio corporation in a South Carolina State Court and service was made upon an agent of the West Virginia Firestone Company. A default judgment was entered and action taken to collect the judgment by attachment of accounts belonging to the West Virginia Firestone Company. Both

companies brought an action in Federal Court to enjoin the enforcement of this judgment, although they still had an opportunity to obtain relief in the state court case. In that case enforcement of the state court judgment was restrained, although it affirmatively appeared that it was still possible for the federal court plaintiffs to set up their rights and seek relief in the state court case. In granting the relief the court said:

> "* * * * It follows, therefore, that upon the record now before us we have to decide whether a corporation against whom a void final judgment has been obtained may, where the necessary jurisdictional facts exist, have the enforcement of the same restrained, *and also whether another corporation, whose property is sought to be taken either upon the mistaken theory that a final judgment has been obtained against it, or that by reason of its relationship to another corporation against whom the judgment was obtained,* may, where jurisdictional facts exist, obtain the aid of a federal court to restrain and enjoin, in a proper case, persons so acting from taking its property in satisfaction of such judgment.
>
> "We think both questions should be answered in the affirmative. *This was also the conclusion at which the lower court arrived, and its refusal to exercise the authority was solely upon the ground that the state court wherein the judgment was obtained might, at any time within a year from the recovery of the judgment, or, where the judgment was attacked on equitable grounds, at any time after a year, grant complete relief. This, we think, was error, for, even though it be conceded that com-*

plainants, or either or both of them, might have appeared by petition in the court in which the judgment was obtained and applied to have the judgment set aside upon grounds similar to those contained in the bill filed in the federal court, they were not confined to this relief alone. The necessary diversity of citizenship, and the amount involved, gave them their right to ask relief in the proper federal court, and a federal court, in the exercise of its equity power, may, and should in a proper case, enjoin the collection of a judgment fraudulently or *unlawfully* obtained in a state court." (p. 814) (Italics ours).

(3) Conflict of the Decision Below With a Prior Decision of the Circuit Court of Appeals for the Sixth Circuit.

The same situation arose in *Ballard & Ballard Company v. Munson Steamship Line* (C. C. A. 6-1928) 25 Fed. (2d) 252, certiorari denied 278 U. S. 611. Judgment was obtained by default in a state court of Kentucky against the Steamship Line. It was void because the Steamship Line was not doing busines in Kentucky and the agents served were not its agents. The Steamship Line learned of the default eleven days after it was taken and under Kentucky law the judgment did not become final for forty-nine days thereafter. Although the Steamship Line made no attempt to go into the state court action and assert its rights, the court affirmed the issuance of an injunction restraining the state court plaintiff from enforcing the judgment.

(4) Petitioner Could Not Have Asserted Its Rights as Mortgagee in the Quo Warranto Suit.

Even if the view as interpreted by the court below that petitioner was bound to make a showing that it had no extra judicial notice or knowledge of the pendency of the state court proceedings and hence could not have obtained relief in the state court, be accepted as generally applicable, we submit that the record in the case as it stands satisfies the requirement for the further reason, that as a matter of law petitioner could not have asserted its rights in the quo warranto suit even if it had known about it in time.

The procedure in quo warranto actions is regulated strictly by statute (General Code of Ohio Sections 12303-12344). *State Ex Rel v. Columbus Del. & M. Elec. Co.*, (1922) 104 O. S. 120. The sections of the Ohio Code governing the procedure in quo warranto are exclusive, and the other general sections of the code with reference to actions and proceedings have no application. The quo warranto sections make no provision by which petitioner could have intervened in the quo warranto suit to obtain any relief therein.

That petitioner could not have intervened therein as a matter of right, see *Toledo Traction Light & Power Co. v. Smith*, (1913, District Court, Northern District of Ohio) 205 Fed. 643, where it is said by Judge Killits:

> "* * * In the first place, the statutes of Ohio do not award an action in quo warranto as a matter of right * * *. It would seem to us that the remedy

by quo warranto is therefore not quite complete, where the party interested must appeal to the discretion of some other person or body." (p. 662).

Concededly, if petitioner had no standing to go into the quo warranto suit other than a questionable right to appeal to the discretion of the state court (for the effect of this see *Coe v. Armour Fertilizer Works*, supra,) the instant case is not only brought squarely within the rule of *Wells Fargo & Co. v. Taylor*, (1920) 254 U. S. 175, where the bill alleged that the express company had not been in any wise "negligent or at fault", and other cases relied upon by the court below, but it likewise is brought squarely within the very letter of the proposition enunciated by the court below, when it says there must be a showing by petitioner either that it had no notice of the state court proceeding *or could not have asserted its rights therein.* If this be true in the case of a void judgment against a named defendant, it must be all the more so in this case where petitioner was not even named as a party to the state court suit.

Moreover, the record affirmatively shows that if there was negligence upon anyone's part, it was upon the part of the City. The supplemental mortgage was filed for record in the Recorder's office on June 19, 1925, which was prior to the passage of the ordinance directing the filing of the quo warranto proceedings. Thus the City knew that the Trustee under the mortgage had a claim to the franchise of the Ohio Electric Power Company, if one

existed. Section 12310 Ohio General Code provides:

> "All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise."

As the City saw fit to ignore the rights of the petitioner under the mortgage in the quo warranto proceedings, we submit it is unconscionable that the petitioner residing in a distant state should be presumed nevertheless to have learned of the City's action against the Power Company, and now be held to have lost its rights as a result of the proceedings in the quo warranto case. This amounts to saying that the City by deliberately omitting to include the Trustee under the mortgage in the quo warranto case, nevertheless obtained the same rights against the Trustee as though the Trustee had been included in those proceedings and had had its day in court therein, a proposition which has never heretofore had the sanction of any court.

II.

The Federal Courts, Not Being Inhibited by Judicial Code Section 265 From Granting the Injunction Under the Facts of This Case, Petitioner is Entitled to Protection by Injunction Against Destruction of its Property in the Franchises Whether Such Destruction is Threatened by Force or Unconscionable Enforcement of the Ouster Decree.

The foregoing authorities demonstrate, we submit, not only that the injunction granted by the District Court does

not violate Judicial Code Section 265, but that the circumstances present in this case are appropriate to satisfy the conditions essential to the granting of relief by the federal courts. It is beyond controversy, we think, that in such a case the petitioner mortgagee is entitled to protection by way of injunction against the destruction of its property rights in the franchises whether such destruction is threatened by force or the unconscionable enforcement by the respondent city of the state court ouster decree.

In *Simon v. Southern Railway Company*, supra, this court said:

> "* * * For even where there has been process and service, if the court 'finds that the parties have been guilty of fraud in obtaining a judgment * * * it will deprive them of the benefit of it.' McDaniel v. Traylor, 196 U. S. 415, 423. *Much more so will equity enjoin parties from enforcing those obtained without service. For in such case the person named as defendant 'can no more be regarded as a party than any other member of the community.'* " (p. 122) (Italics ours).

In *Wells Fargo & Co. v. Taylor*, (1920) 254 U. S. 175, this court said:

> "In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, *the provision does not * * * prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement*

will be contrary to recognized principles of equity and the standards of good conscience." (p. 183) (Italics ours).

III.

The Petitioner Mortgagee Not Having Been a Party to or Served in the Quo Warranto Proceedings, is Not Bound by the Quo Warranto Decision; But is Entitled to its Day in Court in a Forum of its Own Selection and Upon Issues Deemed Pertinent by it Upon the Question of the Existence of the Franchises and its Rights therein; the Circuit Court of Appeals Erred in Giving Conclusive Effect to the Quo Warranto Decision by Refusing to Pass Upon Said Questions.

1. Petitioner is Entitled to an Independent Determination by the Federal Courts Upon the Questions of the Existence of the Franchises and its Rights Therein.

The Circuit Court of Appeals in holding that this suit could not be maintained in the Federal District Court, because it was merely an attempt by petitioner to relitigate the issues theretofore determined in the state courts between the respondent city and the Ohio Electric Power Company, virtually held the quo warranto decree binding upon petitioner.

In doing so, we submit that the Circuit Court of Appeals not only came into conflict with the decisions of this court but erroneously departed from the rule as laid down by its own prior decisions.

In *Postal Telegraph Cable Co. v. Newport,* (1918) 247 U. S. 464, this court held that a decision of the state court which denied asserted federal rights through the application of a former state court judgment would not conclude this court if such application was clearly inconsistent with the right of due process of law. We respectfully submit that this principle applies here and that the decision of the court below denying petitioner's right to have the question as to the franchise rights passed upon by the federal courts, because of the former judgment (quo warranto decree) in the state court should not be allowed to stand. In the Postal Telegraph case the court said at page 476:

> "* * * The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U. S. 274, 277; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236; Simon v. Craft, 182 U. S. 427, 436. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34, 46; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423), *so it cannot without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.*" (Italics ours).

That the Circuit Court of Appeals should have treated the quo warranto judgment the same as a void judgment in so far as it affected petitioner's property rights for

failure of the respondent to make petitioner a party to that action and thus give it a day in court, see: *United Sheet & Tin Plate Co. v. Hess,* (C. C. A. 6-1908) 159 Fed. 889:

> "A decree upon either aspect of the case would be fruitless, unless the mortgagees would be thereby concluded. That they would not be, not being parties, is too plain to be discussed. Louisville Trust Company v. Cincinnati, 76 Fed., 296, 22 C. C. A. 334; Keokuk & Western Railroad Company v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450." (p. 892).

We think it is well settled generally that a mortgagee is entitled to an injunction against the enforcement of any judgment rendered in a case to which he was not a party and which will destroy the value of his security. Specifically see the opinion of the court below in the oft-cited case of *Louisville Trust Co. v. Cincinnati,* 76 Fed. 296 (1896), like the instant case in its essential feature, where the first thing decided was:

> "• • • There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which would prevent such easements from passing to a purchaser at foreclosure sale. *It therefore follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly im-*

peaching their validity and duration without being made a party thereto.'' (p. 299) (Italics ours).

In a case where the requisite federal jurisdiction is present, as here, the rule that the federal courts will make an independent determination of the true meaning of applicable state statutes and law is well expressed in the following language from the case of *Kuhn v. Fairmont Coal Co.*, 215 U. S., 349, at page 360:

> ''* * * So, when contracts and transactions are entered into and *rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved,* then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued.'' (Italics ours).

and in *Louisville Trust Company v. City of Cincinnati,* supra, the Circuit Court of Appeals below recognized this rule in the following language:

> ''* * * The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of another state, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment.'' (p. 304).

2. The Decision of the Circuit Court of Appeals in Holding that Petitioner's Bill Must Be Dismissed Without Considering the Issues as to the Nature, Source and Extent of the Franchise Rights Results in Leaving the Respondent City at Liberty to Destroy Petitioner's Right in the Franchise Either by Force or by Application to the State Courts to Enforce the Decree Against the Ohio Electric Power Company, and Thus Deprive Petitioner of Vested Property Rights Without Ever Having Had a Day in Court.

The Circuit Court of Appeals in its opinion in the case at bar, speaking of the issues raised by the pleadings and the evidence with respect to the source, nature and extent of the franchise rights of petitioner's mortgagor, said:

> "We do not find it necessary to pass upon these questions or to consider in connection therewith, as argued, the scope of the City's powers and the effect of its acquiescence in the use of its streets after the expiration of the city ordinances, * * *" (R. 573)

As we have previously pointed out, the District Court sustained the position of the petitioner as against the respondent city upon these issues, and since the Circuit Court of Appeals did not see fit to consider them, the findings of the District Court upon the facts and the application of the law of Ohio thereto theoretically stand unaffected by the opinion of the Circuit Court of Appeals, although the practical result is to leave the rights subject

to complete destruction at the instance of the respondent city.

3. Under the Statutes of Ohio, as Construed by the Supreme Court of Ohio at the Time the Power Company Mortgage Upon the Norwalk Franchise Was Executed, Such Franchise Was Valid and Was Derived From the State.

At the time the petitioner's predecessor, The Equitable Trust Company of New York, acquired its rights under the mortgage in May 25, 1925, as the District Court found, it had been definitely established in Ohio by *Zanesville v. Zanesville Telephone & Telegraph Company*, (1901) 64 O. S. 67, *Farmer v. Columbiana Telephone Company*, (1905) 72 O. S. 526, *Queen City Telephone Co. v. Cincinnati*, (1905) 73 O. S. 64, and *Hardin-Wyandot Lighting Company v. Upper Sandusky*, (1916) 93 O. S. 428, 251 U. S. 173, that electric light and power companies organized in Ohio between 1887 and 1896 acquired franchises by direct grant from the State of Ohio under the statutes then in effect, subject only to the making of an agreement with the municipality as to the mode of use of its streets, or in the event or failure to reach an agreement, to the direction of the Probate Court fixing such mode of use, and that such rights were not subject to defeat or impairment by a municipality through its insistence upon unreasonable or arbitrary terms as to mode of use or the exaction of any compensation therefor. That such franchises were perpetual had been settled in Ohio by the decisions in the case

of *State ex rel v. Northern Ohio Traction & Light Co.*, (1915) 93 O. S. 466, reversed, *Northern Ohio Traction Co. v. Ohio*, (1918) 245 U. S. 574, and afterward by *Ohio Public Service Co. v. State ex rel Fritz*, (June 2, 1925) 113 O. S. 325, reversed (April 11, 1927) 274 U. S. 12.

In view of the fact that the Circuit Court of Appeals has appeared to assume and treat the case at bar as being simply an effort to obtain a readjudication of the law and facts which were before the State Court of Appeals and the Supreme Court of Ohio in the quo warranto action, we venture to point out briefly the important distinctions between the defense of Ohio Electric Power Company to the quo warranto action and the presentation of petitioner's case in the federal courts. The case at bar was presented upon the theory that there was an agreement at all times as to the mode of use of the city streets between the Ohio Electric Power Company and the city (whereas, the defense in the quo warranto suit was upon the basis that there was no evidence one way or another as to agreement about mode of use); that the company and its predecessors continued to observe the mode of use so agreed upon with the acquiescence and consent of the city at all times; that due to the expenditure of considerable sums of money upon the system in the city and the payment of taxes by Ohio Electric Power Company and its predecessors of which the City received its proportion, the City was estopped to deny the existence of any agreement as to mode of use or the existence of the franchise rights; and finally that the passage of an ordinance by the City in 1924 regulating the

use of the streets by Ohio Electric Power Company, as well as other utilities, with which the company complied completely at the direction of the city, amounted at once to a consent to the continued use of the streets by the City and an estoppel against the City from asserting that the company was not using the streets with the City's consent in a manner approved by the City. *All of these vital elements were lacking in the presentation of the defense of the Ohio Electric Power Company to the quo warranto action in the state courts.*

The decision of the Circuit Court of Appeals in refusing to consider the franchise questions operates to give the quo warranto decision conclusive effect as a judicial repudiation of the law of Ohio as previously declared by its Supreme Court and by this court in cases brought up from Ohio in reliance upon which the bondholders represented by the petitioner invested their money. That the result is to deprive petitioner of its vested property rights without due process of law is clear.

A change of law by judicial decision in effect depriving an investor by contract or otherwise of his investment (which would be the result under the decision below) is as abhorrent to justice as such a change of law by legislative action, as was long ago announced by this court in *Gelpcke vs. City of Dubuque* (1863) 1 Wallace 175.

The hardship upon the bondholders who acquired their bonds in 1925, upon the strength of a clear cut line of applicable local decisions and of those of this court in cases brought up from Ohio, is obvious. Under such cir-

cumstances, as we understand the decisions, this court, following the rule in the *Gelpcke* case, has many times reiterated that in cases where the federal jurisdiction is present, federal courts should hold themselves free to decide what the state law was and to enforce it as laid down by the State Supreme Court before the contracts were made, rather than in later decisions.

Moore-Mansfield Co. v. Electrical Co., (1914) 234 U. S. 619, 625; *Tidal Oil Company v. Flanagan*, (1924) 263 U. S. 444, 452; *Great Northern R. R. v. Sunburst Oil & Refining Company*, (1932) 287 U. S. 358, 364, 77 Law Ed. 153, 157.

That the Ohio Supreme Court has taken the view that the prior state court decisions are the law for intermediate transactions, see:

Thomas v. State of Ohio, ex rel, Gilbert, 76 O. S. 341;
Lewis & Lewis v. Symmes, 61 O. S. 471.

4. The Circuit Court of Appeals Erred in Ordering the Bill Dismissed Without Affording Petitioner an Opportunity to Show That it Had no Knowledge of the Quo Warranto Proceedings Until After Final Judgment Therein.

Finally, we venture to repeat the suggestion made upon the petition for rehearing before the Circuit Court of Appeals that at the worst the bill should not be dismissed, but the case should be remanded to the District Court with instructions to receive testimony from both parties as to whether petitioner had been guilty of any negligence bar-

ring relief in equity. In order to demonstrate that such procedure would not be futile, and that such evidence could be produced, we included in the appendix to the petition for rehearing affidavits from the various officers and counsel for the petitioner and its predecessors, who were in charge of the mortgage trust here involved in its behalf, which showed that petitioner had no knowledge of the quo warranto action until the summer of 1929, subsequent to the Supreme Court decision in the quo warranto case on June 12, 1929. This we especially urge, since there was no suggestion in the petition or the evidence or claim in the City's answer that petitioner did have any knowledge of the quo warranto proceedings before the entering of final judgment therein. That this would be a proper exercise of discretion see: *Panama Mail S. S. Co. v. Vargas,* 281 U. S. 670; *U. S. v. Rio Grande Dam & Irrigation Co.,* 184 U. S. 416; *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins,* 176 U. S. 167; *Columbus Gas & Fuel Co. v. Columbus* (C. C. A. 6) 55 F. (2d) 56; *Wilson v. Spencer,* (C. C. A. 5) 261 F. 357; *Lee v. State Bank & Trust Co.,* (C. C. A. 2) 38 F. (2d) 45.

E

CONCLUSION

We respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the errors herein pointed out may be cured, that the conflict of the decision below with those of this court,

other circuits and its own prior decisions may be removed, that the general and local law may be properly and authoritatively defined, that the judgment of the Circuit Court of Appeals should be reversed, and that of the District Court below sustained in order that justice may be done your petitioner, and a grave injustice to bondholders be avoided, and that for such purpose a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

GEO. D. WELLES,
EARL F. BOXELL,
Toledo, Ohio,
Of Counsel for Petitioner.

TRACY, CHAPMAN & WELLES,
Toledo, Ohio,
MILBANK, TWEED, HOPE & WEBB,
New York, N. Y.,
Solicitors for Petitioner.

APPENDIX

STATUTES INVOLVED

(a) Scope of the Injunction.

36 Stat. 1162. (Section 265 Judicial Code), 28 U. S. C. 379:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. §720; Mar. 3, 1911, c, 231, §265, 36 Stat. 1162.)"

(b) Nature of Quo Warranto.

G. C. of Ohio, Sections 12303, et seq.

"§12303. Proceedings against a person.—A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state;

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, work a forfeiture of his office;

3. Against an association of persons who act as a corporation within this state without being legally incorporated. (R. S. §6760.)"

"§12304. Against a corporation.—A like action may be brought against a corporation:

1. When it has offended against a provision of

an act for its creation or renewal, or any act altering or amending such acts;

2. When it has forfeited its privileges and franchises by non-user;

3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises;

4. When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right in contravention of law. (R. S. §6761.)"

"§12305. Who may commence action.—When directed by the governor, supreme court, or general assembly, the attorney general or a prosecuting attorney, shall commence such action. When, upon complaint, or otherwise, either of such officers has good reason to believe that any case specified in the next preceding section can be established by proof, he shall commence an action. (R. S. §6762.)"

"§12310. All claimants to be made defendants.—All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise. (R. S. §6767.)"

"§12311. Actions in quo warranto, where brought.—An action under this chapter can be brought only in the supreme court or in the court of appeals of the county in which the defendant, or one of the de-

fendants resides or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business; except that, when the attorney general files the petition, it may be brought in the court of appeals of Franklin county. (103 v. 433; R. S. §6768.)"

"§12312. Leave to file petition; notice.—Upon application for leave to file a petition, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto. If leave be granted, an entry thereof shall be made on the journal, or, the fact be indorsed by the judge on the petition, which shall then be filed. (R. S. §6769.)"

"§12313. Issue of summons and service.—When the petition is filed without leave and notice, a summons shall issue, and be served as in other cases. Such summons may be sent to and returned by the sheriff of any county by mail, who shall be entitled to the same fees thereon as if it had been issued and returned in his own county. (R. S. §6770.)"

"§12314. Service by publication.—When a summons is returned not served because the defendant, or its officers or office, cannot be found within the county, the clerk must publish a notice for four consecutive weeks in a newspaper published and of general circulation in the county, setting forth the filing and substance of the petition. Upon proof of such publication, the default of the defendant may be entered, and judgment rendered thereon, as if he

had been served with summons. (R. S. §6771.)"

"§12315. Pleadings after petition.—The defendant may demur or file an answer, which may contain as many several defenses as he has, within thirty days after the filing of the petition, if it was filed on leave and notice, or after the return day of the summons; and the plaintiff may file a demurrer or a reply to such answer within thirty days thereafter. (R. S. §6772.)"

"§12317. Judgment where office, franchise, etc., found to have been usurped.—When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that he be ousted and altogether excluded therefrom, and that the relator recover his costs. (R S. §6774.)"

"§12323. Judgment when corporation has forfeited its rights.—When, in such action, it is found and adjudged that, by an act done or omitted, a corporation has surrendered or forfeited its corporate rights, privileges, and franchises, or has not used them during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved. (R. S. §6780.)'

"§12324. Other acts.—When it is found and adjudged in such case, that a corporation has offended in a matter or manner which does not work such surrender or forfeiture, or has misused a fran-

chise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense or the exercise of such power. (R. S. §6780.)"

(c) Nature and Extent of Franchise Rights.

Revised Statutes of Ohio 1880, Sections 3454, 3461, 3471:

"§3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road. (50 v. 274, §47.)"

"§3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of

the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (62 v. 72, §5.)"

"§3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

Revised Statutes of Ohio 1890, Section 8752, 83 Ohio Laws, 143:

"(8752) §1. Be it enacted by the General Assembly of the State of Ohio, that a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all

wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires."

Revised Statutes of Ohio, 1890, Section 3471a, 84 Ohio Laws 7:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies. (January 26, 1887, 84 v. 7.)"

Revised Statutes, Section 3471a, as amended by Act of April 21, 1896, 92 Ohio Laws, 204:

"AN ACT

To amend section 3471a of the Revised Statutes of Ohio.

Section 1. Be it enacted by the General Assembly of the State of Ohio, That section 3471a, as enacted January 26, 1887, (84 O. L., 7), be and the said section hereby is amended so as to read as follows:

Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, except section

three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; and

this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal in any circuit court of the state.

SECTION 2. That said section 3471a shall be and the same hereby is repealed; and this act shall take effect and be in force from and after its passage."